IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MRS. JUSTICE K.HEMA

FRIDAY, THE 13TH APRIL 2007 / 23RD CHAITHRA 1929

CRL.REV.PET.NO. 4423 OF 2006(C)

(ORDER IN M.P.NO.46/06 DT. 08.12.06 OF PRL. MAGISTRATE, JUVENILE COURT (CJM), ERNAKULAM)

REVN. PETITIONER:

JOSE MAVELI, DIRECTOR,
JANA SEVA SISU BHAVAN, P.B.NO.107,
ALUVA SETTLEMENT, ALUVA.

BY ADV. SRI.B.S.SWATHY KUMAR

RESPONDENTS:

1. STATE OF KERALA, REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

2. K.BABU, S/O.VIJAYAN,
4/236, KULAIKUNNU NAGAR, CHENNAI.

ADDL.R3. P.J.PETER, SECRETARY, JANASEVA SISUBHAVAN,
P.B.NO.107, ALUVA SETTLEMENT, ALUVA.

(ADDL.R3 IMPLEADED AS PER ORDER DATED 14.3.2007 IN CRL.M.A.3223/07).

R1 BY PUBLIC PROSECUTOR (SRI.C.K.SURESH).
R2 BY ADV. SRI.P.GOPAKUMARAN NAIR &
BY ADV. C.S.DIAS
R3 BY P.A.ANITHA
AMICUS CURIAE SRI. GEO PAUL.

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 13/04/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

K. HEMA, J.

---------- **C.R.**

CRL.R.P. NO. 4423 of 2006

Dated this the 13th day of April, 2007

O R D E R

> "We are guilty of many errors and faults, but our worst crime is abandoning the children, neglecting the foundation of life. Many of the things we need can wait. The child cannot; right now is the time his bones are being formed, his blood is being made and his senses are being developed. To him, we cannot answer `tomorrow'. His name is `today'"
>
> (Gabriel Mistral)

Yes, I shall not wait. I cannot answer him, `tomorrow'. I must speak for him today. Each and every letter of the above quote must inspire me to speak for him today--his name is `today' !!

FACTS, BRIEFLY:

2. Five minor children of different age, both male and female (I shall avoid mentioning their names in this judgment in their best interest), were produced before learned Chief Judicial Magistrate by the additional third respondent herein, under Section 32(1) of the Juvenile Justice (Care and Protection of Children) Act, 2000 ('the Act', for short), along with a report. According to additional third respondent, he is the Secretary of 'Jena Seva Sishubhavan' which is an Institution registered under the Travancore-Cochin

Literary, Scientific and Charitable Societies Act, 1955 which saves street children who are found begging, with the aid of the social workers and officials. It is averred that it aims to eradicate child begging and child labour. It is stated in the report filed by third respondent that all the five children were found begging, without any home or settled place or abode and any without any ostensible means of subsistence.

3. The additional third respondent therefore, sought for release of the children to the temporary care and protection of the Institution, where the third respondent is the Secretary. Other prayers are also made: (i) to transfer the children to any other juvenile home or special home as the court deems fit, for the welfare and safe custody of the children (ii) to pass any other order or direction which the court deems fit for the welfare of the children.

4. On production of the children along with a report, learned Magistrate, while acting as the Child Welfare Committee (`the Committee' for short), in the light of the decision of the Division Bench of this court (vide ***Parvathy v. Superintendent, Corporation Relief Centre*** **(2002(1) KLT 523)**, passed the following order:

> "....They are now under the care and protection of Janaseva Sishubhavan, Aluva and they have no parents or relatives to look after or take care of now. Therefore, they are entrusted to Janaseva Sishubhavan for proper care and protection and rehabilitation until further orders pending enquiry". (Emphasis supplied)

5. After about six months, a petition was filed by second respondent herein before the same Magistrate, claiming himself to be the father of the three female children, who were entrusted to the institution (they are named in the petition). He undertook that he would look after them and provide care and protection to them and also educate them at his native place. The second respondent made a request to give a direction to the Institution to release the children to him.

6. On receiving the petition, learned Magistrate ordered for production of documents. The second respondent produced certain photographs and documents. Thereafter, on his being satisfied that second respondent is the father of the three children, impugned order was passed by learned Magistrate , directing petitioner herein to release the children forthwith to second respondent. The said order is challenged by the Director of the institution, who is not a party to the proceedings before the Magistrate/Committee, on various grounds.

7. While learned counsel for petitioner would vehemently argue that the Institution is entitled to retain the children in their custody, in the best interest of the children, learned counsel for second respondent strongly contended that second respondent, being the father, has the exclusive right to have the children in his custody and control. It was also pointed out that the Institution illegally denied to second respondent, his lawful right to have custody of his children or even access to them.

8. On going through the records and on hearing both sides, I am satisfied that the entire proceedings are fraught with many illegalities. The errors commenced from the very inception, starting from the production of the children before learned Magistrate and thereafter, at every step taken in the matter. The Institution as well as learned Magistrate did not follow the various provisions of the Act and Rules, which are intended for the benefit of the children. I find striking errors, illegalities and impropriety at every stage of the matter. I shall deal with them in detail, one by one.

PRODUCTION OF THE CHILD:

9. When a "child in need of care and protection", is received by a person or organisation, such person/organisation shall comply with certain provisions of the Act and the Kerala Juvenile Justice (Care and Protection of Children) Rules, 2003 (`the Rules', for short). Rule 10(2) of the Rules provides as to how a child is to be dealt with, on his/her reception, by a person/organisation. The relevant portion from Rule 10(2) of the Rules can be extracted as hereunder:

> **"Section 10. Procedure for Production of a Child before the Committee.-**-
>
> (1) xxxxxxxxx
>
> (2) (i) When a person/organization mentioned in sub rule (i) above receives a child in need of care and protection, he shall produce the child before the Committee with a report of the circumstances under which he has received the child. Such children, above five years of age, shall be produced before the Committee within the shortest possible time but not later

than twelve hours of such reception, excluding the journey time. For children under five years of age, the person/ organization shall send a written report along with the photograph of the child, within twenty four hours of reception, excluding the journey time after admitting the child in a nearby Foundling Home/Placement Agency

ii) xxxxxxxxx

iii) In case a Recognised Voluntary Organisation takes a child to the Committee, they shall also submit a report on the circumstances under which the child came to its notice, and efforts shall be made by them for tracing the family".

10. It is laid down in Rule 10(2)(i) of the Act that when a person/organisation receives a "child in need and care of protection", and if such child is above the age of five years, it shall be produced before the Committee, within shortest possible time, but not later than twelve hours of such reception, excluding the journey time, as per Rule 10(2)(i). For children under five years of age, the person/organisation shall send a written report, along with the photograph of the child, within twenty four hours of reception, excluding the journey time after admitting the child in a nearby Foundling Home/Placement Agency.

11. But, the Institution herein has not complied with the above mandate of law. Though the children are alleged to be 'in need of care and protection' and at the time of their reception by the Institution, they admittedly belonged to the age-group of below and above 5 years, they

were produced before the Magistrate only two long years, thereafter. As per the averments in the revision memo, the children were received by the Institution in 2004 but they were produced only in 2006. This is in clear violation of Rule 10(2)(i) of the Rules. The unduly long period of detention of the children at the Institution, without their production before the authority concerned under the Act not only violates the express provisions contained in the Rules, but it also has affected the interest of the children adversely. Because, the very purpose of the legislation is to "restore" the children to parents, parental environment, (based on the universally accepted child-rights), but, the children were denied such precious rights, for three long years.

12. Learned Magistrate also failed in his duty to ascertain whether the relevant provisions are complied with or not, while the children were produced. Before passing an order in respect of the children produced before the Magistrate, he shall confirm that the person or organisation who received the 'child in need of care and protection' has acted in accordance with the mandatory provisions and other relevant provisions of the Act and Rules and nothing has occurred to him affecting his rights. But, that was not done in this case.

FAMILY NOT TRACED:

13. Rule 10(2)(iii) of the Rules extracted above provides that in case, a Recognised Voluntary Organisation takes a child to the Committee, efforts shall be made by them for tracing the family. But, the report submitted at

the time of production of the children by additional third respondent (who was the secretary of the Institution) does not reveal that any efforts were made by the Institution to trace the family of the children. On the other hand, even the fact that the children were removed from the custody of second respondent (who claims to be the father) and other family members was suppressed, for reasons best known to the office bearers of the Institution.

14. It is clear from records that in all probabilities, this is not a case where office bearers of the Institution must have been totally unaware of the children's family details. It is stated in the revision memo itself that the "children's mother is no more". In such circumstances, why did the Institution make no enquiry to confirm whether second respondent is the father ? Even though second respondent claims to be the father, and this fact is not specifically denied in the pleadings, why does petitioner pretend ignorance now, about the whereabouts of second respondent, who claims to be the father?

15. The attitude of petitioner appears to be quite strange and uncomprehensible. It is totally unjustifiable also, on any scale. In all fairness, petitioner or additional third respondent ought to have disclosed whatever details are known to them, at least to this court, if they are genuinely interested in the welfare of the children. They are, in fact, bound to disclose such details as per law. But, they seem to play the game of a tough rival custodian, who fights for the exclusive custody of the children

against a legal guardian. Quite surprisingly, an argument is also raised that the burden is upon second respondent to prove that he is the father, while the provisions in the Rules themselves mandate that the Organisation shall make efforts to trace the family, which include the father.

16. The Institution had more than enough time to confirm and report to the court whether second respondent is the father/guardian of the children. The children were in their custody since 2004 onwards. But, they have not done anything to comply with Rule 10(2)(iii). Instead, they deliberately suppressed the relevant details about the family.

17. It is not enough for an Institution to make an attractive claim that a child is well-fed, well-clothed and well-educated by the Institution. That alone may not cater the needs of a child which the law-makers dreamt of and also intended, as per the provisions of the relevant Statute. They have other duties to discharge, in the interest of the welfare of the children. But, they miserably failed to discharge their duties, in accordance with law.

"RESTORATION" IS PRIME OBJECT:

18. The prime object of the Act is to restore the child to parents and parental environment. Section 39 of the Act reads as follows:

> **"Section 39. Restoration**.—(1) Restoration of and protection to a child shall be the prime objective of any children's home or the shelter home.
>
> (2) The children's home or a shelter home, as the case may be, shall take such steps as are considered necessary for the restoration of and protection to a child

> deprived of his family environment temporarily or permanently where such child is under the care and protection of a children's home or a shelter home, as the case may be.
>
> (3) The Committee shall have the powers to restore any child in need of care and protection to his parent, guardian, fit person or fit institution, as the case may be, and give them suitable directions.
>
> *Explanation*.—For the purposes of this section "restoration of child" means restoration to—
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> (*a*) parents;
>
> (*b*) adopted parents;
>
> (*c*) foster parents.

19. As per section 39 of the Act, in the case of a child who has a parent or guardian, the Children's Home to which the child is sent (vide also section 33 of the Act), shall take such steps as are necessary for the restoration and protection of a child, who is deprived of his family environment, temporarily or permanently. In the absence of Children's Home, if the child is sent to a person/institution, naturally, such person/Institution shall also have the same statutory duties and liabilities to restore the child, as stated in section 39 of the Act.

20. The Committee also has powers under section 33 of the Act to restore the "child in need of care and protection" to his parent, guardian etc., and give them suitable directions. As per Explanation to section 39, "restoration of child" means restoration to a) parents; b) adopted parents; c) foster parents. But, neither the Institution nor the Committee/Magistrate

took any steps for "restoration" of the children as laid down in section 39 of the Act, except by observing that the children are entrusted to the Institution for 'rehabilitation' etc. Nothing more was done, though much is to be done under the Act. The failure to comply section 39 of the Act resulted in the children being kept away from their home, close relatives and parental environment for about three long years, which is not at all intended by the Act.

NO STEPS TO RETURN CHILD:

21. It is submitted by learned counsel for second respondent that second respondent, in fact, approached the Institution on several occasions with requests to return the children to his custody, he being their father. But all those requests were illegally and mercilessly turned down by the Institution, it is contended. Ultimately, second respondent had no other alternative than to approach learned Magistrate for getting their custody.

22. As per the relevant provisions of law, the Organisation who receives a 'child in need of care and protection' is bound to take all necessary steps to trace out the family of the 'child in need of care and protection' to his/her parent. The Institution to which the child is sent by the Committee shall also take all steps for restoration of the children to the parents, foster parents or adopted parents. Rehabilitation shall also be effected, as stated in the Act. But, the Institution did not care to take any step in these lines.

REHABILITATION:

23. The Act also contemplates "rehabilitation" of the children, as laid down in section 40 of the Act. As per section 40, the rehabilitation and social integration of a child shall begin during the stay of the child in the Children's Home or Special Home, and social reintegration of children and rehabilitation shall be carried on alternatively by adoption, foster care, sponsorship and sending the child to an after-care organisation.

24. Any other person/Institution to which the "child in need of care and protection" is sent, naturally, shall also be bound to take steps for rehabilitation of the child. But, no such steps were taken by the Institution in this case. Even though learned Magistrate specifically ordered that the children are "entrusted to Janaseva Sishubhavan for proper care and protection and 'rehabilitation' until further orders pending enquiry", nothing was done by the Institution. There is no explanation for non-compliance of this direction.

25. Even at this stage of revision, the Institution appears to be unwilling to attempt any 'rehabilitation'. On the other hand, petitioner strongly resists the children being handed over to second respondent who claims to be their father. The Institution appears to be not prepared even to confirm whether he is the father or guardian of the children, to whom they can be safely released to. At least, when a person claims children's custody, the Institution ought to have made enquiries about such person and confirmed whether he is a fit person with whom the children can be sent.

But, none at the Institution seems to be bothered to trace out the parents and restore or rehabilitate the children, despite the very long period of institutional detention of the children, which is obviously, illegal.

26. The fact whether second respondent is actually the parent or not, could have been easily ascertained from the children themselves. The children are of such age that they can state whether second respondent is treated as their father or not. The matter need not be magnified as a case involving paternity dispute. No paternity test need be insisted upon. The Institution may be able to conclude from the version of the children itself, whether second respondent is a fit person to whom the children can be released. Their untutored words can safely be acted upon, if those are found to be acceptable. The aim of the Institution must be to put the children in "parental environment", in tune with the object of the Act and not to make a unsustainable claim over the children for permanent custody.

27. It is enough if the Institution or Committee, as the case may be, is prima facie satisfied that the person claiming the children is the parent or guardian and that he is not disqualified in any manner to have custody of the children. It is enough if such person is willing to take care of the children and foster them and act in the best interest of the welfare of the children. The children can be released to such person, without any delay, at least as a fit person, until conclusion of the inquiry under section 33 of the Act and other relevant provisions. (Vide Rule 11 also).

28. Learned Magistrate/Committee failed to take any steps to "restore" the children to parental, adopted, foster care as required. But, he appears to have acted blindly on a report (submitted by third respondent), which is bereft of the essential details. The children were sent to the Institution, without considering any of the relevant facts.

REPORT UNDER SECTION 32:

29. The report filed by third respondent in this case is also not in accordance with law. As per section 32 read with Rule 10(2)(iii) of the Rules, a report on the "circumstances under which the child came to its notice" shall be produced along with the child before the Magistrate/Committee. Though a report is filed in this case by additional third respondent, it does not amount to a report "on the circumstances under which the children came to the notice" of the Institution. It does not disclose the relevant details.

30. The expression, "circumstances" means 'the surroundings of an act', as per Law lexicon by P. Ramanatha Aiyar, reprint edition, 1992. It also means 'the particulars which accompany an act'. The word "circumstances" is explained in Salter v. State (163 Ga. 80, 135 S. E. 409) also as, "related or accessory facts, occurrences or things which stand around, or about, which attend upon, which closely precede or follow, which surround and accompany, which depend upon, or which support or qualify a principal fact or event, (vide Black's Law Dictionary Forth edition).

31. Thus, the report shall contain a statement of the particulars which closely precede, surround and follow the back ground in which the child came

to the notice of the person/organisation. It must reveal the related or accessory facts, occurrences or things which stand around, or about, which attend upon, which closely precede or follow, which surround and accompany the reception of the child by the person or organisation. The report must also show in detail, the date, time and place where the child who is allegedly 'in need of care and protection' came to the notice of the person/Institution. It must state with whom or under what circumstances the child was found and received at the Institution. The relationship of the child with the person with whom the child was found also may be ascertained and reported.

32. It must be narrated in the report, in what state, the child was found. The report shall disclose whether the child has a home, close relative, parent or guardian and whether any attempt was made to trace them out. The report shall also reveal in whose custody the child was kept, on receipt of the child, and till its production before the Committee. It shall also state whether he/she is produced within the stipulated time prescribed by the statute and if not produced within such the time, the reason for non-production of child before the Committee. In short, a concise statement of all the relevant facts closely preceding, surrounding and following the reception of the child must be stated in the report. Then alone it would become a report by the Institution, "on the circumstances under which the child came to its notice", as required by law. The purpose of the report is to aid the Committee to take a right decision in respect of the child. It is also to help the Committee to conclude whether the child produced before the

Committee is a 'child in need of care and protection', so as to exercise its jurisdiction under the Act.

33. Though the children in this case were received at the Institution as early as in 2004 (two years prior to the production of the children before the Committee) as revealed from the revision memo, such important fact is not mentioned in the report. Though it is clear from the revision memo that the children were taken away from the custody of second respondent, (who now claims to be the father of the children) and that they were found in a circus troop etc., such facts are not stated in the report. Instead, it is made to appear, as per the report that those children are street children, without a home, means, parent, family or guardian. There is only a bare allegation that the children were found begging, without a home etc. and that some people took them to Institution.

34. The date, time and place at which the children were found, the person with whom the children were found, the person who brought them to the Institution etc., are also not stated. Though the fact whether the children have a parent or guardian is the most relevant factor, it was not brought to the notice of the Committee that they were removed from the custody of second respondent, who claims to be the father. Absolutely no mention is made in the report about second respondent. The report is, thus, misleading and without the essential details, as required by law. There is absolutely no explanation why the Institution did not place before the

Magistrate/Committee, the whole truth relating to the circumstances under which the children were received.

35. Learned Magistrate also did not ascertain from the person who produced the children, the required details, before taking a decision to send the children to the Institution. He did not make any attempt, even to find out whether the averments made in the report under Section 32 of the Act are true or not, before entrusting the children to Institutional custody. Had adequate attention been paid to ascertain the details, the Magistrate would have been aware of the unduly long period of institutional detention of the children and also the various illegalities committed by the Institution. Learned Magistrate would also have become aware of the fact that children were taken away from the custody of second respondent and other family members. Had those facts been known, it is unlikely that learned Magistrate would have passed an order, leaving the children to the custody of the Institution, even without making any effort to hear second respondent or even ordering a detailed enquiry under section 33 of the Act.

WHO SHALL PRODUCE:

36. As per section 32 and Rule 10(1) of the Rules, "child in need of care and protection" shall be produced before the Committee by certain persons specified therein. Under section 32(iii) of the Act, (as the provision stood at the relevant time, prior to amendment), a "child in need of care and protection" shall be produced by a registered organisation or agency as may be recognised by State Government. As per section 32(iv) of the Act, the

child shall be produced before the Committee by a social worker or a public spirited citizen authorised by the State Government.

37. But, the person (additional third respondent) who produced the children in this case does not come under such category of persons referred to in the above provisions. He is not a person or organisation coming under section 32 of the Act, as on the date of production of the children before the Magistrate. Though the Institution involved in this case is a registered organisation, there is nothing on record to show that it is recognised by State Government for the above purpose. So also, even if third respondent is treated as a social worker or a public spirited citizen, there is nothing on record to reveal that he was authorised by the State Government.

38. Recognition or authorisation is essential for the organisation or the social worker/public spirited citizen, as the case may be, under section 32 and Rule 10 of the Rules, for producing a child in need of care and protection before the Committee as on the relevant date. In the absence of such recognition or authorisation, the production of the children before the Committee by an organisation/person who is not recognised or authorised by government also is not in accordance with the provisions of the Act and Rules. (It has to be mentioned here that the above provision was subsequently amended).

39. According to learned counsel for petitioner, the Institution is a reputed Institution, doing lot of service to abandoned street children etc. Much was argued by him to impress upon me about the reputation of the

Institution and the manner in which the Institution is functioning etc. But, while dealing with the case of a 'child in need of care and protection', it is not the mere reputation of the Institution which matters. However reputed an Institution might be, the Committee/Magistrate must be satisfied that provisions of the relevant Statutes are strictly complied with by the Institution. The illegalities committed by the Institution cannot be connived at, however strong the assertions are, on the reputation of the Institution.

40. In fact, it is only reasonable to think that such violations would not have occurred, had the children been produced by a competent person/organisation, as referred to in section 32 of the Act and Rule 10 of the Rules. The report would have, in all probabilities, contained the relevant details and there would not have been any serious suppressions. May be, legislature in its wisdom has insisted and specified the category of persons who shall produce the child before the Committee, to ensure that the Committee gets a report as required by law, without any suppressions.

41. The Committee/Magistrate has to act as a true guardian of the "child in need of care and protection" and ensure that the provisions of the Act and Rules are scrupulously followed by all concerned and everything is done in the best interest of the welfare of the children. No Institution nor any person shall be allowed to violate the express provisions of the Act and Rules. The violations, if any noticed, shall be viewed seriously, especially since such violations are likely to affect the children's welfare adversely. The Committee/Magistrate shall also be more alert in matters relating to children

who are in need of care and protection. Learned Magistrate, however, did not advert his attention to any of the above facts before entrusting the children to the Institution. This appears to be the same state of affair in the case of other Committees across the State, which are dealing with children under section 2(d) of the Act, may be because, no guide lines were so far laid down.

42. It is also pertinent to note that it also did not occur to learned Magiistrate to ascertain whether the children involved in this case fall under section 2(d) of the Act or not, whether they are children in "need of care and protection".

CHILD UNDER SECTION 2(d) ?

43. A "child in need of care and protection" is defined under Section 2(d) of the Act which reads as follows:

> "Section 2(d): "child in need of care and protection" means a child,-
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> (*i*) who is found without any home or settled place or abode and without any ostensible means of subsistence,
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> (*ii*) who resides with a person (whether a guardian of the child or not) and such person-
>
> (*a*) has threatened to kill or injure the child and there is a reasonable likelihood of the threat being carried out, or
>
> (*b*) has killed, abused or neglected some other child or children and there is a reasonable

likelihood of the child in question being killed, abused or neglected by that person,

(*iii*) who is mentally or physically challenged or ill children or children suffering from terminal diseases or incurable diseases having no one to support or look after,

(*iv*) who has a parent or guardian and such parent or guardian is unfit or incapacitated to exercise control over the child,

(*v*) who does not have parent and no one is willing to take care of or whose parents have abandoned him or who is missing and run away child and whose parents cannot be found after reasonable inquiry,

(*vi*) who is being or is likely to be grossly abused, tortured or exploited for the purpose of sexual abuse or illegal acts,

(*vii*) who is found vulnerable and is likely to be inducted into drug abuse or trafficking,

(*viii*) who is being or is likely to be abused for unconscionable gains,

(*ix*) who is victim of any armed conflict, civil commotion or natural calamity"

CHILD WHO HAS PARENT:

44. A close reading of section 2(d) of the Act shows that a child who is having a parent or guardian cannot, strictly speaking, be said to be a "child in need of care and protection", unless such parent/guardian is possessed for such disqualifications as are specifically laid down in sub-clauses (ii), (iv) or

(v) of section 2(d) of the Act. Sub-clauses (ii), (iv) and (v) specifically refer to a child who has a parent or guardian.

45. As per sub-clause (iv), if the child has a parent, only if such parent is unfit or incapacitated to exercise control over the child that his child becomes a "child in need of care and protection". (May be, the parent is mentally deranged or so). Under sub-clause (v), if the child has parents, they must have abandoned him/her so that such child can be treated as a "child in need of care and protection". If it is a case of a 'missing and run away child', the child can be treated as a "child in need of care and protection" under section 2(d)(v), only if the parent cannot be found, even after a reasonable enquiry.

46. It is also clear from section 2(d)(v) that a child can be stated to be a "child in need of care and protection", if no one is willing to take care of him/her, though he has no parent. The corollary that follows from the above clause is that even in cases where the child is parentless, he does not become a "child in need of care and protection", unless no one is willing to take care of him/her.

47. As per section 2(d)(ii)(a)or (b) of the Act, in case the child is residing with a parent or guardian (vide definition of guardian), such person must have threatened to kill or injure the child and there is a reasonable likelihood of the threat being carried out or the parent must have killed, abused or neglected some other child or children and there is a likelihood of

the child in question being killed, abused or neglected by such person for treating a child to be a "child in need of care and protection".

48. It is only under the above circumstances that a child who has a parent can be stated to be a child coming under section 2(d) of the Act. A child who is having a parent, cannot ordinarily be brought under the definition of Section 2(d) of the Act, unless such parent is having such disqualifications or incapacities as are specifically referred to in sub-clauses (ii)(a) or (b) or sub-clauses (iv) or (v) of section 2(d) of the Act or that he is to be "unfit" by the Committee. It must be noted that it is not all and every disqualification of a parent which is brought within the sweep of section 2(d) of the Act. The disqualifications of a parent/guardian are as specified in the provision. The petitioner has no case that the children produced in this case have parent or guardian or that such person is unfit or has any such disqualifications as are referred to in the relevant sub-clauses in section 2(d) of the Act.

SEC.2(d)(i), IF APPLICABLE ?

49. But, according to third respondent who produced the children, they were found begging without any home or settled place of abode or without any ostensible means of subsistence. As already discussed by me, this statement of fact itself is misleading. Still, I shall consider the scope of section 2(d)(i) of the Act. The said provision lays down that a "child in need of care and protection" means a child who is found without any home or settled place or abode and without any ostensible means of subsistence. So,

do the children in this case fall under section 2(d)(i) of the Act ? Can a child who is having a parent be stated to be a "child in need of care and protection", if the parent becomes homeless, without a settled place or abode and without any ostensible means of subsistence? Is a child born to a financially poor parent be treated as a "child in need of care and protection" under section 2(d)(i) of the Act ? In my considered opinion, it may not be so. Here are my reasons:

50. Firstly, the case of a child who has a parent/guardian has been specifically and distinctly dealt with under sub-clauses(ii), (iv) and (v) of section 2(d) of the Act. So, if a child has a parent, only those provisions may be made applicable to him/her. Further, there is nothing in the language in sub-clause (i) of section 2(d) of the Act to show that the said provision applies to a child who is having a parent who is homeless, penniless etc. The very expression 'parent' or `guardian' is missing in the provision and hence, going by the plain language used therein, it may not apply to a child who has a parent or guardian. While certain other sub-clauses in the same provision viz., section 2(d) specifically refers to a child having a parent or guardian, the omission to refer to a parent/guardian in sub-clause (i) of section 2(d), according to me, must be taken note of, while interpreting the relevant provision.

51. It is also relevant to note that it is not laid down in any of the sub-clauses in section 2(d) that if a "parent" is without home, settled place or abode or means, a child born to such parent will be a "child in need of

care and protection". On the other hand, if the parent is unfit or is having any of the disqualifications as stated in the relevant sub-clauses, his/her child can be stated to be a "child in need of care and protection". But, in none of such sub-clauses, financial incapacity, poverty and the consequential lack of means of a parent, absence of a house, settled place or abode have been made disqualifications of a parent, so as to bring his/her child within the sweep of section 2(d) of the Act.

52. Under section 2(d)(i), it is the means of the "child" what is made relevant and not that of the "parent". Sub-clause (i) of section 2(d) deals with a homeless "child" who has no settled place or abode and who is without ostensible means. It does not specifically refer to a "child" who has a parent without home, ostensible means etc. In such circumstances, in my view, section 2(d)(i) would apply only to a "child" who is homeless, without a settled place or abode and without any obstensible means. The said provision does not refer specifically to a homeless "parent", without settled place or abode and without ostensible means. Had legislature intended that the means, residence etc., of the parent must be made relevant under section 2 (d)(i) of the Act, there would have been no difficulty to draft the said provision accordingly, by including the relevant expressions in the provision.

53. So long as a provision does not refer to a particular expression, [in this case, "parent" in section 2(d)(i)], it may not be proper or legal for the court to insert any expression which is found missing in the provision so as to give it a particular meaning, as the court may desire, unless such insertion

can be justified, as consistent with the legislative object or intention. As long as there is nothing in the particular provision to indicate that it refers to or include a homeless, penniless parent also, in my view, court shall not go beyond what is expressly laid down in the provision, particularly if, it is likely to defeat the object of the Act. If a child who has a parent also is to be included in section 2(d)(i), the court will be forced to introduce the word, "parent" or similar expression in section 2(d)(i), wherever applicable. However, such an alteration is not permissible, while interpreting a provision in a Statute, unless it is necessary to achieve the object of the Act. The court cannot, therefore, read into section 2(d)(i), the word "parent" or any other word to bring within its purview, a child who is born to a financially poor parent.

54. There is another ground also to support my view. The object of the Act is mainly to restore and children to their parents and parental environment. The very object being so, it is unreasonable to think that a child who has a parent has to be treated as a "child in need of care and protection", for the sake of sending him/her back to the same parent. Since the object of the Act itself is to bring the child who is deprived of parental care back to the family environment, it will be meaningless to say that a child having a parent has to be deemed to be a "child in need of care and protection" so as to send him back to the same parent, especially when such parent is not disqualified under any of the sub-clauses of section 2(d) of the Act.

55. Despite all what I have said, if a contrary view is to be taken, so as to include a child who has a financially poor, homeless parent who is without ostensible means also, under section 2(d), it is likely that many of the slums and the colonies in this country where poor people are living with families will be emptied of the children and removed to various Institutions. Time will be not too far away, when such children will be rocked out of the soothing laps of their penniless parents or guardians to the luxurious cradles of the mushrooming Institutions, under the guise and misuse of the provisions of the Act. The children may also be blown out of their own homes to the far-away-foster homes or adopted homes, even against the will and wish of the biological parents or even that of the children, for the sole reason that the biological parents are financially poor. I really wonder whether legislature in a poor country like ours, ever had any such nightmare at all ??

POVERTY OF PARENT, IF UNFITNESS?:

56. In a country like India, poverty is not quite uncommon. It will, therefore, be unjust and even cruel, if poor financial condition of a parent or guardian ALONE is made the basis for disqualifying a biological parent to be `unfit', so as to treat his child as a "child in need of care and protection". A child may not be treated as a "child in need of care and protection", and nipped him off from the care of his/her own biological parents, only because his parent is financially poor, homeless or penniless. Even if the parents are poor and their purses are empty to feed the children or provide to them a

hut to live in, it is needless to say that a conducive family atmosphere is ensured by most of the parents. It is not a strange in India to find nomaders living in tents with families by the side of a street. Many similar scenes are also not ucommon to us. Though there may be povery, there may be sparkles of happy moments of a family life also, in such tents and such other places. This is the reality.

57. Majority of Indian children are born, not with a silver spoon. The poor financial background of a parent or family alone has not spoiled their welfare in many cases. On the other hand, this is a country where children are educated and taken to great heights, though many of them are, without even a roof under which, they can comfortably sleep. They may not even have sufficient food to satiate or quench their hunger or thirst. Still, they may study under the dim glow of a street light or a neighbour's candle to reach glorious heights. The poverty of their parents alone has never been a hurdle for an Indian child to come up in his life in many a case.

58. The parental care and warmth would provide to them, enough strength to stride through the path of thorny poverty. A child would learn a lot in his life from the bed-time fairy tales, under the parental care, whether he or she be, in a hut or a palace. The `sweet-and-sour' family environment may cool down, the heat of his thirst and hunger. Though poverty may taste bitter to him, the parental care and affection may be sweet and soothing. Nothing can substitute it. The silky bed or velvet clothes, sweet bread or

honey, a golden bowl or silver spoon at an Institution, may not replace the warmth of a family environment.

59. In such circumstances, it is only reasonable to think that legislature would not have intended that a parent who is not having a house to live in and who is without any ostensible means of subsistence, must be deprived of the custody of a child, for that reason alone. It does also not appear to be the intention of the legislature that a child shall be denied of his right to live under the care and custody of his biological parents or the guardian, who may be willing to look after him, only because they are financially poor. A child has every right to live with his parents in family environment, however financially poor, his parent or guardian may be. It shall be the right of every child to live with his parents, as per the United Nations Convention on the Rights of Child. I am not, therefore, inclined to interpret the provisions of the Act so as to deny to the child, his precious right to live in a family atmosphere, even if their homes are poverty-stricken.

60. The poor financial condition of a parent alone is not at all sufficient to deprive the child of a family environment, which is to be ensured by the provisions of the special enactment. Unfitness of the parent referred to in sub-clause (iv) of section 2(d) of the Act has also, therefore, no reference to the financial incapacity alone. The word 'unfit' means as per the Oxford Dictionary, "not of an acceptable standard; not suitable; not fit". A parent who is not of an acceptable standard or not suitable to be a parent can be said to be `unfit'. A child of such a parent is a 'child in need of care and

protection' as per section 2(d)(iv). But, poverty of the parent by itself may not make a parent "unfit" to be a parent and bring his child under any of the sub-clauses of section 2(d) of the Act. That may not be sufficient to bring a child born to a financially poor parent under sub-clause (i) of section 2(d) of the Act also.

61. Still, I would say that it is for the Committee to decide, on facts and circumstances of each case, whether a parent is "unfit" and whether financial incapacity of his parent has, in any way, contributed to his unfitness, so as to bring the child within the purview of section 2(d). I make it clear that I do not mean to mention that under no circumstance a financially poor parent can be stated to be "unfit". There may be cases where burning poverty may be a basic factor which would lead to undesirable situations in the family and the children may be forced for anti-social activities etc. The Committee will examine the relevant facts and decide, on the facts and circumstances of each case, whether the parent is "unfit" or not. But, the financial unfitness of the parent alone may not be sufficient to deprive the child of parental care, if the parent is other wise fit.

62. If the Committee finds that a parent goes wrong in any manner and does anything detrimental to the child's welfare, it may issue suitable directions to the parent, to prevent any harm being caused to him. But, such wrongs committed by the parent alone may not be sufficient in all cases to deny parental care to the child. In fit cases, an erring parent may be punished for his illegal acts, as per the provisions of the Act itself. But,

before depriving a child of his parental care and environment, on the ground of unfitness or any other disqualifications of his biological parent, the Committee/Magistrate must be extremely cautious. It is always better that a parent is corrected and the probable harm be prevented, by issuing directions, as the Committee may deem fit and proper. But, in no case, the child shall be lightly denied his right to live with his parents in a family atmosphere.

63. It is better for the courts to think twice, as to what would happen, if a child in need of care and protection (who is released to an Institution or Children's Home) attains 18 years of age.

CHILD AFTER 18 YEARS ?:

64. As per section 33(3) of the Act and Rule 11(14) of the Rules, the Committee can order retention of a "child in need of care and protection" in Children's Home, till he attains eighteen years of age. The child can be retained in an Institution only till 18 years of age. Thereafter, it is unthinkable as to where, to which place, land, home, hell or heaven the child has to go. The child, in all probabilities, will be forced to join his family, once he/she attains 18 years of age after the institutional care.

65. It is needless to say that the Institution will have no right to keep the children in its custody after they attain 18 years of age. The Committee will also be powerless to issue orders to allow such retention in the Institution. So, if the children are kept away from biological parents or guardian, who have no disqualification, as referred to in sub-clauses (ii), (iv)

or (v) of section 2(d) of the Act, that too for such long period, there can be no doubt that the children may be total strangers in their family and even at their own native land. Having been maintained under the institutional care, away from the home and family for such a long period, the parents, guardian, home and relatives with whom the child has to ultimately land up, on his/her attaining 18 years of age, will be totally alien to him/her. It is likely that the child may normally, find it difficult to adjust with the atmosphere in the poor family, particularly in their teenage.

66. Back home, in his teenage, the child may find a world of difference between his life at the Institution and that in the family. It is likely that he may face severe adjustments problems in his own home and he may even turn out to be psychological wreck, finding it difficult to get along with his own kith and kin and the strange atmosphere in his own house. Thus, the child may, in reality, feel totally unprotected, rather than well-protected, contrary to the dreams of the law-makers.

67. Taking all these facts into consideration, I find that a child having a parent or guardian shall not be treated as a child in need of care and protection, unless the parent or guardian has the specific disqualifications, as referred to in section 2(d) (ii), (iv) or (v) of the Act. The Committee shall take into consideration, all these facts, while the case of a child who is produced before it is dealt with. Each and every step has to be taken with utmost care and caution and the Committee/Magistrate shall deal with the children, standing in the shoes of a true parent to them, until they are

restored to the parents or parental care to its satisfaction, after conclusion of the enquiry under section 33 of the Act.

WHAT IS THE INQUIRY U/S 33 ?

68. There were heated arguments on the scope of enquiry Section 33 of the Act. Learned counsel for petitioner argued that the enquiry contemplated under section 33 is to be conducted following the procedure for summons cases under the code of criminal procedure(`the code'. For short). Section 32 of the Act provides that the Committee shall hold an inquiry in the prescribed manner. Section 33 refers to an enquiry. It reads as follows:

> "**Section 33. Inquiry**.—(1) On receipt of a report under Section 32, the Committee or any police officer or special juvenile police unit or the designated police officer shall hold an inquiry in the prescribed manner and the Committee, on its own or on the report from any person or agency as mentioned in sub-section (1) of Section 32, may pass an order to send the child to the children's home for speedy inquiry by a social worker or child welfare officer.
>
> (2) The inquiry under this section shall be completed within four months of the receipt of the order or within such shorter period as may be fixed by the Committee :
>
> Provided that the time for the submission of the inquiry report may be extended by such period as the Committee may, having regard to the circumstances and for the reasons recorded in writing, determine.

(3) After the completion of the inquiry if the Committee is of the opinion that the said child has no family or ostensible support, it may allow the child to remain in the children's home or shelter home till suitable rehabilitation is found for him or till he attains the age of eighteen years.

Rule 11 of the Rules also lays down the procedure for inquiry. It can be extracted as hereunder:

"Rule 11. Procedure for inquiry:

(1) Whoever produces the child to the Committee shall produce a birth certificate or any other certificate / declaration by the parents or guardian in proof of age within a period of fourteen days.

(2) In case of any doubt or dispute with regard to the age of the child, the Member or Committee, as the case may be, shall pass an order to obtain the opinion of the medical experts to fix the age of the child under question.

(3) The Committee shall also satisfy that the child has not been subjected to ill-treatment or harassment either by the Police or by any other person who takes charge of the child for the purpose bringing before the Committee and if any such incident of ill-treatment or harassment has been either noticed by the Committee itself or caused to be brought to the notice of the Committee, it shall initiate appropriate action against the offenders, by filing a complaint before the Magistrate having jurisdiction.

(4) The Committee may release the child to the care of parent/ guardian/ Fit Person / Fit Institution with or without surety till such time the final disposition is made.

(5) The Committee shall direct the Probation Officers or any other person/ organisation empowered to conduct social enquiry including the prospects of rehabilitation and furnish the report to the Committee, but also direct him to cause a expert opinion on cases pertaining to the psychological or psychiatric problems of the child. The Committee may also direct the expert to furnish a special report about the child in need of care and protection.

(6) The Committee shall maintain the list of experts in the field of psychology, counselling and guidance, psychiatric institutions etc. who are willing to provide such services.

(7) The direction for the inquiry under sub rule (5) shall be in Form-I.

(8) The inquiry shall be completed within four months of receipt of the order or within such shorter period as may be fixed by the Committee, provided that the period for submission of report may be extended by the Committee having regard to the circumstances and for reasons to be recorded in writing.

(9) The social investigation report shall be submitted in Form-II.

(10) If the Committee is satisfied that the child can be corrected and rehabilitated at his home surroundings with or without additional non-institutional services,

the Committee can order the release of the child with his parents/guardian or fit person or fit institution, as the case may be, and give them suitable directions.

(11) Whenever a child is ordered to be restored under the care of parents or guardians or fit person to participate in group counselling or similar activities or to be restored under the care of any fit institution, the Committee shall direct the Probation Officer/ Social Worker to effect supervision for such period as the Committee may deem fit period and report to the Committee regularly.

(12) The Committee shall also direct a Medical Officer or any Medical Institution to undertake medical examination in respect of children and furnish report for follow-up action thereof.

(13) If the Committee finds that a child is abused as per the report of Medical Officer or as per the report of Probation Officer/Social Worker, the Committee shall issue summons to concerned persons to be present on such dates, or dates specified for enquiry and initiate appropriate action against such offender by filing a complaint before the Magistrate having jurisdiction.

(14) After completion of the inquiry, if the Committee is of the opinion that the said child has no family or ostensible support it can order for retention of the child in the Children's Home until suitable rehabilitation is found for him, or till he attains the age of eighteen years in the children's home. The Committee shall carry out an annual review of the progress of the child in the home.

69. A close look at section 33 of the Act and Rule 11 of the Rules reveal that there are mainly two stages of enquiry envisaged under section 33 of the Act.

'PRELIMINARY ENQUIRY':

70. The first stage of enquiry is on production of the children before the Committee. It may be called `preliminary enquiry' for convenience. As per section 33, on the report from any person referred to in Section 32(1) or on its own , the Committee shall hold an inquiry in the prescribed manner etc., and may pass an order to send the child to the Children's home. It is not, however, specifically stated in the provisions as to how an enquiry under sub-section (1) of Section 33 of the Act is to be conducted, before sending the child to Children's Home, a fit person, Institution etc.

71. The main purpose of the enquiry at the initial stage is for taking a decision as to how a child can be dealt with, on its production. An immediate decision will have to be taken at that stage and hence, a detailed enquiry may not be possible. A prima facie satisfaction of the relevant facts have to be arrived at to pass an appropriate order. As per Rule 11 of the Rules, the Committee may release the child to the care of parent/guardian/fit person/fit institution with or without sureties, till such time the final disposition is made. Section 38 of the Act lays down that if the child is found to be hailing from a place outside jurisdiction of the Committee, the Committee SHALL order the transfer of the child to the competent authority having jurisdiction over the place of residence of the child.

72. The Committee shall also, under Rule 11(3) satisfy itself that the child has not been subjected to any ill-treatment or harassment either by police or any other person who takes charge of the child for the purpose of bringing before the Committee. If any such ill--treatment or harassment is noticed by the Committee or it is caused to be brought to the notice of the Committee, it shall initiate appropriate action against the offenders by filing a complaint before the Magistrate having jurisdiction, as referred to in Rule 11 (3) of the Rules.

73. So, to take a decision as to whom the child should be sent to or which place the child shall be transfered to, and whether the child has been subjected to ill-treatment or harassment etc., the Committee will have to consider several aspects. It may also be necessary to confirm that the child comes under section 2(d) of the Act. Hence, a proper application of mind will be inevitably essential at this stage. But, how an enquiry has to be conducted at that preliminary stage has not been specifically laid down either in section 33 or in Rule 11. Therefore, the Committee may adopt its own procedure to arrive at a prima facie satisfaction of the relevant factors to pass an order on production of the child.

74. The object and aim of the Committee at that stage must be to arrive at a prima facie satisfaction: (i) that the child comes under section 2 (d) of the Act (ii) that the report filed under Rule 11 contains the truth (iii) that the person who produces the child is such person specified in section 32 or Rule 10 (iv) that the parent/guardian/person/institution to whom the child

may be released and the surety or sureties, if any, are fit enough for releasing the child (v) that the child hails from a place lying within the jurisdiction of the Committee or other place outside its jurisdiction, for the purpose of deciding whether the child shall be transfered under section 38 of the Act (vi) that the child the child has not been subjected to any ill-treatment or harassment either by police or any other person who takes charge of the child for the purpose of bringing before the Committee and (vii) such other factors which the Committee may deem it necessary to ascertain, to pass an interim order in respect of the child.

75. This may be done as per a 'preliminary enquiry' by questioning the child, the alleged parent/guardian if available, the person who produces the child or such other person which the committee may deem fit and proper. It shall also peruse the report and may insist, if necessary, to file an affidavit by such person as the Committee may direct so as to act upon a `prima facie' satisfaction for exercising jurisdiction over the child. No detailed enquiry, following any of the provisions under the code of criminal procedure can be conducted at that stage. There may not be time or opportunity also to do this. Because, the child needs to be released or sent to an appropriate shelter at the earliest, as the Committee may deem fit and proper, pending a detailed enquiry under the provision.

DETAILED ENQUIRY U/S.33:

76. The second part of the inquiry under section 33 of the Act is a detailed inquiry, in the manner prescribed under section 33 read with Rule 11

of the Rules. Rule 11 of the Rules lays down how the enquiry is to be conducted. The enquiry contemplated under Section 33 of the Act after sending a child to the Children's home etc., is not an enquiry as provided under the Code of Criminal Procedure. I cannot agree with the argument advanced by learned counsel for the revision petitioner that the Committee is bound to follow the procedure laid down in the Code for trial in summons cases, as laid down by Section 54 of the Act. Section 54 of the Act reads as follows:

> "Section 54:**. Procedure in inquiries, appeals and revision proceedings**.—(1) Save as otherwise expressly provided by this Act, a competent authority while holding any inquiry under any of the provisions of this Act, shall follow such procedure as may be prescribed and subject thereto, shall follow, as far as may be, the procedure laid down in the Code of Criminal Procedure, 1973 (2 of 1974) for trails in summons cases.
>
> (2) Save as otherwise expressly provided by or under this Act, the procedure to be followed in hearing appeals or revision proceedings under this Act shall be, as far as practicable, in accordance with the provisions of the Code of Criminal Procedure, 1973 (2 of 1974)."

77. Section 54 of the Act lays down that save as otherwise expressly provided by this Act, a competent authority while holding any inquiry under any of the provisions of this Act, shall follow such procedure as may be

prescribed and subject thereto, shall follow, as far as may be, the procedure laid down in the Code of Criminal Procedure, 1973 (2 of 1974) for trials in summons cases. The nature of enquiry to be conducted in Section 33 has been specifically laid down in the provisions of the Act and Rules. Section 33 (1) of the Act provides that the child may be sent to a Children's Home for "speedy enquiry" by a social worker or Chief Welfare Officer. The enquiry referred to in sub-section (1) of Section 33 (after the child is ordered to be sent to Children's Home) is thus, a "speedy enquiry". Such an enquiry has to be conducted by a social worker or a Child Welfare Officer and not by the Committee. Thus, there is no enquiry which has to be personally conducted by the Committee itself, as per Section 33(1) of the Act, after the child is ordered to be sent to the Children's Home etc.

78. As per section 54 of the Act, competent authority shall follow such procedure as may be prescribed and subject thereto, shall follow, as far as may be, the procedure laid down in the Code of Criminal Procedure, 1973 (2 of 1974) for trails in summons cases, only if the Committee itself is holding any inquiry under any of the provisions of this Act. But, there is no such enquiry to be conducted by the Committee itself as per section 33 and Rule 11, and hence, there is no question of the Committee following any provision in the code for trials in the summons cases for the detailed enquiry.

79. A reference to Rule 11 also makes the position quite clear. Sub-clause (5) of Rule 11 provides that the Committee shall direct the Probation Officers or any other person/organization empowered to conduct "social

enquiry" including the prospects of rehabilitation and to furnish the report to the committee. The procedure for enquiry referred to in Section 33 is laid down in Rule 11 wherein specific provisions are made referring to a "social enquiry" and "social investigation" etc. A "social enquiry" can be ordered to be conducted in Form No.1 in sub-rule (5). Even a form is prescribed for giving a direction for the enquiry to be conducted in the case of a "child in need of care and protection" produced before the committee. (The above rule comes under Chapter III which relates to the "child in need of care and protection").

80. The enquiry under Section 33 read with Rule 11(5) shall be completed within four months of receipt of the order or within such a shortest period as may be fixed by the committee etc. provided that the period of submission of report may be extended by the committee having regard to the circumstances and for reasons to be recorded in writing. There can also be a social investigation report as provided in Form No.2. It is depending upon the contents of such reports referred to in section 33 and Rule 11 that the committee shall take a final decision on conclusion of the inquiry under Section 33(3) read with Rule 11(14) of the Rules.

81. But, learned Magistrate failed to order any enquiry under section 33 or under Rule 11 and also to keep the matter pending, until final orders are passed. He also failed to get a report, after completion of the enquiry. No enquiry was ordered by giving a direction in Form No.1 as per Rule 11(5) or to get a Social Investigation Report in Form No.2. But, the proceedings

were, practically closed, even though it is recorded in the proceedings sheet and the order that the children are entrusted with the institution "pending enquiry".

TRANSFER OF CHILDREN:

82. Section 38 of the Act and Rule 36 of the rules lay down that if during inquiry, it is found that the child hails from the place outside the jurisdiction of the Committee, the Committee SHALL order transfer of the child to the competent authority having jurisdiction over the place of residence of the child, having regard to the best interest and safety either absolutely or on conditions as it deems fit. Arrangement shall be made to escort the child to the Committee to which the child is transferred. The case file and records relating to the child shall also be sent along with the child, as per Rule 36(4) of the Rules.

83. But, learned Magistrate failed to transfer the children under section 38 of the Act, though there were sufficient reasons to know that the children hail from a different state. The mother-tongue of the children is `Tamil', but learned Magistrate does not appear to have ascertained, from which place the children hail, for transferring them to the appropriate authority having jurisdiction over the place of residence of the children, without delay. It would not have been difficult to procure the necessary details of the children at the initial stage of the case itself. It would have been possible also to transfer the children to the appropriate committee. But,

not even any attempt was made to transfer. Though the provision contained in section 38 is mandatory but, it was not complied with.

84. It is better to keep in mind, the purpose behind the provision. A child hailing from another State may not feel comfortable in a State where people around him speak a totally different language, which may be unknown to him. The child may find it difficult to communicate and speak out his difficulties or ventilate his stress and strain, to his satisfaction because of communication problems. Hence, it shall be the duty of the Committee/Magistrate to ensure that such child is transfered to its native place at the earliest.

CONCLUSION ON FACTS:

85. Now, coming to the facts of this case, I find that the children shall not be retained any longer at the Institution, for the various reasons already discussed and especially since second respondent has come forward, seeking custody of the children, as their father. The fact that he is the father has not been specifically denied by petitioner in the revision memo or as per the pleadings. It is also admitted that the children were removed from his custody to the Institution. The children were away from the family for the past about three years. The restoration is unduly delayed and hence steps shall be taken for restoration at the earliest, without any further delay.

86. This court had occasion to talk with the children, second respondent and his family members during pendency of this revision, in the presence of learned counsel appearing for the revision petitioner, learned

lDirector General of Prosecutions and also learned Public Prosecutor in my Chamber. Second respondent, in fact, came to the court with a group of persons stated to be his close relatives who included old and young male and female members and children also. The children were also allowed to talk to second respondent and other members of the family.

87. On being satisfied that they should be allowed to mingle freely with the family members, at least during the Christmas vacation, in the best interest of the children, I ordered that the children be released to the second respondent on conditions. The children were allowed to remain with the second respondent for five days, from 26.12.2006 till 30.12.2006. This was done, despite the strong objection raised by learned counsel for revision petitioner and even the State in releasing the children to the second respondent, on the ground that the children may be harassed by him etc. hence, by way of abundant caution, it was also ordered that the children will be under the supervision of the District Probation Officer during the said period. The second respondent was also directed to execute a bond and certain other directions were also issued.

88. The children were, accordingly, kept in the custody of second respondent for a few days during Christmas vacation. A report was also filed by the District Probation Officer who supervised the children during their stay with second respondent stating that they were allowed to spend the days in a Government `One Day Home'. As per the report dated 5.1.2007 of the District Probation Officer, initially, the children had some difficulty in

mingling with second respondent and family members, but later, they freely mingled with them and seemed to be very happy. They were found playing with other children of the group and they visited Children's Park etc. along with the family. The District Probation Officer also reported that he gave visit to them every day and spent few hours with them. As per his report, from his interaction it was revealed that family members of the children are very much interested in them and they also love them very much. It is also reported that the children were well-looked after by second respondent and his relatives. The children, reportedly, were happy on their stay with the relatives.

89. On a perusal of the report of the District Probation Officer and in my interaction with second respondent and the children etc., at my chamber, on a consideration of the various facts and circumstances and on hearing both sides, I am satisfied that nothing shall stand in the way of the children being released to the custody of second respondent, with suitable directions. However, in the light of the strong submissions made by learned counsel for petitioner that second respondent tortured the children, sent them for begging etc. (though these allegations are highly belated), it is only just and proper that the children are transferred under section 38 of the Act for appropriate orders by the competent authority having jurisdiction.

90. The second respondent, children and their family members are

Tamil speaking people and there is no dispute that they belong to State of Tamil Nadu. Hence, it is essential that the children are transferred under section 38 of the Act. In the report filed by additional third respondent, who is the Secretary of the Institution, at the time of production of the children, the following prayers were also made: (i) to transfer the children to any other juvenile home or special home as the court deems fit, for the welfare and safe custody of the children (ii) to pass any other order or direction which the court deems fit for the welfare of the children. I am satisfied that in the interest of welfare of the children, the best course to be adopted is to transfer the children to the appropriate Committee having jurisdiction over the place of residence for appropriate orders. The place of residence of this children can be treated as the place shown in the address of second respondent in the petition filed before the Chief Judicial Magistrate viz., Chennai, Tamil Nadu. The children shall, therefore, be transferred to the Committee at Chennai, lying in Tamil Nadu.

PUBLICATION PROHIBITED:

91. Last but not the least, a petition was filed by the second respondent to direct revision petitioner or such other person or agency not to publish any details pertaining to the children in any newspaper, magazine, news-sheet or visual media, as contemplated under Section 21 of the Amended Act. Section 21 reads as follows:

"21. Prohibition of publication of name, etc., of juvenile or child in need of care and protection

> **involved in any proceeding under the Act.** - (1) No report in any newspaper, magazine, news-sheet or visual media of any inquiry regarding a juvenile in conflict with law or a child in need of care and protection under this Act shall disclose the name, address or school or any other particulars calculated to lead to the identification of the juvenile or child nor shall any picture of any such juvenile or child be published.
>
> Provided that for reasons to be recorded in writing, the authority holding the inquiry may permit such disclosure, if in its opinion such disclosure is in the interest of the juvenile or the child.
>
> (2) Any person who contravenes the provisions of sub-section (1), shall be liable to a penalty which may extend to twenty five thousand rupees.

92. It is contended that the names and photographs of the children are widely published at the instance of the petitioner which is not only not conducive in the interest of the children but also is in violation of section 21 of the Act. I have no doubt that such publication, if any, has to be stopped forthwith, especially in the light of the specific provisions in the Act. Section 21 of the Act relates to publication of name etc., of the "child in need of care and protection" involved in any proceedings under the Act.

93. As per section 21 of the Act, no report in any newspaper, magazine, news-sheet or visual media of any enquiry regarding a "child in need of care and protection" under the Act shall disclose the name, address

or school or any other particulars calculated to lead to the identification of the juvenile or child, except in cases where the authority holding the enquiry specifically permit, for reasons to be recorded in writing, in the best interest of the child. No picture of any such juvenile or child shall also be published. It is also relevant to mention here that as per Section 21(2) of the Act, any person contravenes the provisions in sub-section (1) shall be liable to a penalty which may extent to Rs.25,000/-.

94. I find from records that certain newspapers have published the photographs of the children with their names and other details, revealing their identity and those are produced along with the revision petition. Even during pendency of this revision, similar publication were effected. This is clearly illegal. Section 21 of the Act clearly prohibits publication, and this provision has to be scrupulously followed by the media and all concerned. It is hence, made clear that no picture or other details of any of the children involved in this case or any "child in need of care and protection" shall, hereinafter, be published in any newspaper, magazine, news-sheet or visual media etc., except to the extent, if any, permitted by the appropriate authority concerned. The authority holding the enquiry is empowered to permit such disclosure, in the interest of juvenile or the child. But, while granting permission, the authority has to record the reasons in writing.

95. In the above circumstances, I hereby order that no newspaper, magazine, news-sheet or visual media shall make any publication disclosing the name, address or school or any other particulars which would enable

identification of the children involved in this case and no picture of such children be published. However, I make it clear that this order will not stand in the way of any publication being effected, ensuring that no materials are disclosed, which will enable anybody to identify the children involved. The interest and welfare of the children have to be protected. 'Now is the time when their bones are being formed, their blood is being made, and their senses are being developed. To them, I cannot say, 'tomorrow'. Let no harm be done to them in any manner, whether it be a person, organisation or the media.

96. Before I conclude, I place on record, my sincerest appreciation for the valuable assistance rendered to this court by Sri. Geo Paul, advocate, who is appointed as an Amicus Curiae, in disposing of this revision.

In the result, the following order is passed:

i) The impugned order passed by the learned Chief Judicial Magistrate, directing the children to be released to second respondent is confirmed, by imposing the following conditions:

a) The children shall be released by petitioner to the second respondent forthwith, on second respondent executing a bond to the satisfaction of learned Chief Judicial Magistrate, Ernakulam and also on his filing an undertaking in writing that he will not act in any manner,which is likely to adversely affect the welfare and interest of the children and also that he shall produce the

children before the competent authority having jurisdiction over the place of residence of the children. (The place shown in the address of second respondent in the petition filed by him before the Chief Judicial Magistrate, Ernakulam (Viz. Chennai, Tamil Nadu).

b) The Officer-in-charge of the Children's Home, Alappuzha (since, there is no Children's Home in this District) shall arrange to escort the children, at the expense of the Government to the place of residence of the children, as referred to in this order, for production before the competent authority as per Rule 36(4) of the Rules. The case file and records relating to the children involved in this case shall be sent along with the children. Registry shall take steps for forwarding records.

c) Taking into consideration,the peculiar circumstances of the case, any responsible person deputed from the institution of the revision petitioner is also allowed to escort the children, if so advised, on condition that he/she will not do any thing to disturb peaceful custody of the children by second respondent.

This petition is disposed of accordingly.

Sd/-

K. HEMA, JUDGE.

Vgs.